

**UNPUBLISHED**

**UNITED STATES COURT OF APPEALS**

**FOR THE FOURTH CIRCUIT**

DAVID JOHNSON,  
Petitioner-Appellant.

v.

No. 96-7867

MICHAEL MOORE, Director; CHARLES  
M. CONDON, Attorney General for  
the State of South Carolina,  
Respondents-Appellees.

Appeal from the United States District Court  
for the District of South Carolina, at Florence.  
Henry M. Herlong, Jr., District Judge; Margaret B. Seymour,  
Magistrate Judge.  
(CA-96-187-4-20BE)

Submitted: August 29, 1997

Decided: September 17, 1997

Before MICHAEL and MOTZ, Circuit Judges, and BUTZNER,  
Senior Circuit Judge.

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Vacated and remanded by unpublished per curiam opinion.

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**COUNSEL**

David Johnson, Appellant Pro Se. Donald John Zelenka, Chief Deputy Attorney General, Columbia, South Carolina, for Appellees.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

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## **OPINION**

### **PER CURIAM:**

David Johnson appeals from the district court's order adopting the report and recommendation of the magistrate judge and denying his request for habeas relief pursuant to 28 U.S.C.A. § 2254 (West 1994 & Supp. 1997). Johnson also appeals the denial of his motion for reconsideration. The district court found that Johnson's petition contained both exhausted and unexhausted claims. The court dismissed the unexhausted claim without prejudice and denied the exhausted claims on the merits. When, however, a habeas petition contains both exhausted and unexhausted claims the district court must dismiss the entire petition without prejudice. Rose v. Lundy, 455 U.S. 509, 522 (1982). The petitioner may then either resubmit a petition containing only the exhausted claims or exhaust all claims in state court and then file a new petition. Id. at 520.

Accordingly, the district court's order is vacated, and the case is remanded for further proceedings consistent with this opinion. We grant a certificate of probable cause to appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

### **VACATED AND REMANDED**